

1 **PART 233: 404 STATE PROGRAM REGULATIONS**

2
3 **SUBPART A - GENERAL**

4
5 **§ 233.1 - Purpose and scope.**

6
7 (a) This part specifies the procedures EPA will follow, and the criteria EPA will apply, in
8 approving, reviewing, and withdrawing approval of State programs under section 404 of the Act.

9
10 (b) Except as provided in 232.3, a State program must regulate all discharges of dredged or
11 fill material into waters regulated by the State under section 404(g)(1). **Partial State programs**
12 **are not approvable under section 404.** A State's decision not to assume existing Corps' general
13 permits does not constitute a partial program. The discharges previously authorized by general
14 permit will
15 be regulated by State **individual** permits. However, in many cases, States other than Indian Tribes
16 will lack authority to regulate activities on Indian lands. This lack of authority does not impair that
17 State's ability to obtain full program approval in accordance with this part, i.e., inability of a State
18 which is not an Indian Tribe to regulate activities on Indian lands does not constitute a partial
19 program. The Secretary of the Army acting through the Corps of Engineers will continue to
20 administer the program on Indian lands if a State which is not an Indian Tribe does not seek and
21 have authority to regulate activities on Indian lands.

Commented [MDE1]: MDE supports USEPA's consideration of partial assumption, which would provide additional flexibility to the states.

Commented [MDE2]: While a State may not assume existing ACOE general permits, the activity may be eligible for a properly promulgated State general permit.

22
23 (c) Nothing in this part precludes a State from adopting or enforcing requirements which are
24 more stringent or from operating a program with greater scope than required under this part.
25 Where an approved State program has a greater scope than required by Federal law, the additional
26 coverage is not part of the Federally approved program and is not subject to Federal oversight or
27 enforcement.

28 Note: State assumption of the section 404 program is limited to certain waters, as provided in
29 section 404(g)(1). The Federal program operated by the Corps of Engineers continues to apply to
30 the remaining waters in the State even after program approval. However, this does not restrict
31 States from regulating discharges of dredged or fill material into those waters over which the
32 Secretary retains section 404 jurisdiction.

33
34 (d) Any approved State Program shall, at all times, be conducted in accordance with the
35 requirements of the Act and of this part. While States may impose more stringent requirements,
36 they may not impose any less stringent requirements for any purpose.

37
38 **§ 233.2 - Definitions.** No comments or recommendations at this time.

39
40 **§ 233.3 - Confidentiality of information.** No comments or recommendations at this time.

41
42 **§ 233.4 - Conflict of interest.** No comments or recommendations at this time.

43
44
45
46 **SUBPART B(1) - PROGRAM APPROVAL**

47
48 **§ 233.10 - Elements of a program submission.**

Commented [MDE3]: The threshold analysis for state assumption of the Section 404 program should be the determination that a state program regulates all discharges of dredged or fill material into waters of the United States. At the conclusion of the analysis, the Regional Administrator should have sufficient information to determine if a state has the authority and tools necessary to assume the Section 404 program. This analysis should be independent of any Memorandum of Agreement, establishing how a state-assumed program will be administered. This approach is similar to the strategy used by USEPA's Assumable Waters Subcommittee, which stressed the difference between statutory and regulatory authority necessary to implement Section 404 of the Clean Water Act and the administration of a state-assumed program. Under this approach, Part 233, Subpart B - Program Approval is divided into three separate Subparts, which are identified as Subpart B(1) - Program Approval, Subpart B(2) - Program Administration, and Subpart B(3) - Program Transfer.

1
2 Any State that seeks to administer a 404 program under this part shall submit to the Regional
3 Administrator at least three copies of the following:

4
5 (a) A letter from the Governor of the State requesting program approval.

6
7 (b) A complete program description, as set forth in section 233.11.

8
9 (c) An Attorney General's statement, as set forth in section 233.12.

10
11 (d) ~~A Memorandum of Agreement with the Regional Administrator, as set forth in~~
12 ~~section 233.13.~~

13
14 ~~—(e) A Memorandum of Agreement with the Secretary, as set forth in section 233.14.~~

15
16 ~~—(f)~~ Copies of all applicable State statutes and regulations, including those governing
17 applicable

18
19 **§ 233.11 - Program Description.**

20
21 The program description as required under section 233.10 shall include:

22
23 (a) A description of the scope and structure of the State's program. The description should
24 include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope
25 of permit exemptions if any, and permit review criteria;

26
27 (b) A description of the State's permitting, administrative, judicial review, and other
28 applicable procedures;

29
30 (c) A description of the basic organization and structure of the State agency (agencies) which
31 will have responsibility for administering the program. If more than one State agency is responsible
32 for the administration of the program, the description shall address the responsibilities of each
33 agency and how the agencies intend to coordinate administration and evaluation of the program;

34
35 (d) A description of the funding and manpower which will be available for program
36 administration;

37
38 (e) An estimate of the anticipated workload, e.g., number of discharges.

39
40 (f) Copies of permit application forms, permit forms, and reporting forms;

41
42 (g) A description of the State's compliance evaluation and enforcement programs, including
43 a description of how the State will coordinate its enforcement strategy with that of the Corps and
44 EPA;

45
46 (h) ~~A description of the waters of the United States within a State over which the State~~
47 ~~assumes jurisdiction under the approved program; a description of the waters of the United~~
48 ~~States within a State over which the Secretary retains jurisdiction subsequent to program~~
49 ~~approval; and a comparison of the State and Federal definitions of wetlands.~~

1 ~~Note: States should obtain from the Secretary an identification of those waters of the U.S.~~
2 ~~within the State over which the Corps retains authority under section 404(g) of the Act.~~A
3 STATEMENT AFFIRMING THAT:

4
5 (1) THE STATE IS ASSUMING JURISDICTION OVER WATERS OF THE
6 UNITED STATES WITHIN THE STATE OTHER THAN THOSE WATERS WHICH ARE
7 PRESENTLY USED OR ARE SUSCEPTIBLE TO USE IN THEIR NATURAL
8 CONDITION OR BY REASONABLE IMPROVEMENT AS A MEANS TO TRANSPORT
9 INTERSTATE OR FOREIGN COMMERCE SHOREWARD TO THEIR ORDINARY
10 HIGH WATER MARK, INCLUDING ALL WATERS WHICH ARE SUBJECT TO THE
11 EBB AND FLOW OF THE TIDE SHOREWARD TO THEIR MEAN HIGH WATER
12 MARK OR MEAN HIGHER HIGH WATER MARK ON THE WEST COAST,
13 INCLUDING WETLANDS ADJACENT THERETO; OR
14

15 (2) THE SECRETARY, IN ACCORDANCE WITH SUBPART B(2) OF THIS
16 PART, HAS IDENTIFIED THOSE WATERS OF THE UNITED STATES WITHIN THE
17 STATE OVER WHICH THE CORPS RETAINS AUTHORITY UNDER THE STATE-
18 ASSUMED PROGRAM AND THAT THIS LIST IS INCLUDED IN THE STATE'S
19 SUBMISSION AS PART OF THE PROGRAM DESCRIPTION.
20

21 (i) A description of the specific best management practices proposed to be used to satisfy
22 the exemption provisions of section 404(f)(1)(E) of the Act for construction or maintenance of
23 farm roads, forest roads, or temporary roads for moving mining equipment.
24

25 § 233.12 - Attorney General's Statement. No comments or recommendations at this time.
26

27 § 233.13 - Memorandum of Agreement with Regional Administrator
28

29 § 233.14 - Memorandum of Agreement with the Secretary
30

31 § 233.15§ 233.13 - Procedures for approving State programs.
32

33 (a) The 120 day statutory review period shall commence on the date of receipt of a complete
34 State program submission as set out in section 233.10 of this part. EPA shall determine whether
35 the submission is complete within 30 days of receipt of the submission and shall notify the State
36 of its determination. If EPA finds that a State's submission is incomplete, the statutory review
37 period shall not begin until all the necessary information is received by EPA.
38

39 (b) If EPA determines the State significantly changes its submission during the review
40 period, the statutory review period shall begin again upon the receipt of a revised submission.
41

42 (c) The State and EPA may extend the statutory review period by agreement.
43

44 (d) Within 10 days of receipt of a complete State section 404 program submission, the
45 Regional Administrator shall provide copies of the State's submission to the Corps, FWS, and
46 NMFS (both Headquarters and appropriate Regional organizations.)
47

48 (e) After determining that a State program submission is complete, the Regional
49 Administrator shall publish notice of the State's application in the Federal Register and in enough
50 of the largest newspapers in the State to attract statewide attention. The Regional Administrator

Commented [MDE4]: Depending on the circumstances, this provision would likely benefit EPA, the State, or both EPA and the State. However, there does not appear to be any statutory authority to extend the review period.

1 shall also mail notice to persons known to be interested in such matters. Existing State, EPA,
2 Corps, FWS, and NMFS mailing lists shall be used as a basis for this mailing. However, failure
3 to mail all such notices shall not be grounds for invalidating approval (or disapproval) of an
4 otherwise acceptable (or unacceptable) program. This notice shall:

5
6 (1) Provide for a comment period of not less than 45 days during which interested
7 members of the public may express their views on the State program.

8
9 (2) Provide for a public hearing within the State to be held not less than 30 days after
10 notice of hearing is published in the Federal Register;

11
12 (3) Indicate where and when the State's submission may be reviewed by the public;

13
14 (4) Indicate whom an interested member of the public with questions should contact;
15 and

16
17 (5) Briefly outline the fundamental aspects of the State's proposed program and the
18 process for EPA review and decision.

19
20 (f) Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and
21 NMFS shall submit to EPA any comments on the State's program.

22
23 (g) Within 120 days of receipt of a complete program submission (unless an extension is
24 agreed to by the State), the Regional Administrator shall approve or disapprove the program based
25 on whether the State's program fulfills the requirements of this part and the Act, taking into
26 consideration all comments received. The Regional Administrator shall prepare a responsiveness
27 summary of significant comments received and his response to these comments. The Regional
28 Administrator shall respond individually to comments received from the Corps, FWS, and NMFS.

29
30 (h) If the Regional Administrator approves the State's section 404 program, he shall notify
31 the State and the Secretary of the decision ~~and publish notice in the Federal Register. Transfer~~
32 ~~of the program to the State shall not be considered effective until such notice appears in the~~
33 ~~Federal Register. The Secretary shall suspend the issuance by the Corps of section 404~~
34 ~~permits in State regulated waters on such effective date.~~

35
36 (i) If the Regional Administrator disapproves the State's program based on the State not
37 meeting the requirements of the Act and this part, the Regional Administrator shall notify the State
38 of the reasons for the disapproval and of any revisions or modifications to the State's program
39 which are necessary to obtain approval. If the State resubmits a program submission remedying
40 the identified problem areas, the approval procedure and statutory review period shall begin upon
41 receipt of the revised submission.

42
43 **(J) IF THE REGIONAL ADMINISTRATOR FAILS TO MAKE A**
44 **DETERMINATION WITH RESPECT TO ANY PROGRAM SUBMITTED BY A STATE**
45 **UNDER THIS SUBPART WITHIN ONE HUNDRED AND TWENTY DAYS AFTER THE**
46 **DATE OF THE RECEIPT OF SUCH PROGRAM, SUCH PROGRAM SHALL BE**
47 **DEEMED APPROVED AND THE REGIONAL ADMINISTRATOR SHALL SO NOTIFY**
48 **SUCH STATE AND THE SECRETARY.**

Commented [MDE5]: Similar language appears at 404(h)(3)

49
50 § 233.16 § 233.14 - Procedures for revision of State programs.

1
2 (a) The State shall keep the Regional Administrator fully informed of any proposed or actual
3 changes to the State's statutory or regulatory authority or any other modifications which are
4 significant to administration of the program.
5

6 (b) Any approved program which requires revision because of a modification to this part or
7 to any other applicable Federal statute or regulation shall be revised within ~~one year~~ **TWO**
8 **YEARS** of the date of promulgation of such regulation, except that if a State must amend or enact
9 a statute in order to make the required revision, the revision shall take place within ~~two~~ **THREE**
10 years.

Commented [MDE6]: Existing regulation establishes an unrealistic timeframes

11
12 (c) States with approved programs shall notify the Regional Administrator whenever they
13 propose to transfer all or part of any program from the approved State agency to any other State
14 agency. The new agency is not authorized to administer the program until approved by the
15 Regional Administrator under paragraph (d) of this section.
16

17 (d) Approval of revision of a State program shall be accomplished as follows:
18

19 (1) The Director shall submit a modified program description or other documents
20 which the Regional Administrator determines to be necessary to evaluate whether the program
21 complies with the requirements of the Act and this part.
22

23 (2) Notice of approval of program changes which are not substantial revisions may be
24 given by letter from the Regional Administrator to the Governor or his designee.
25

26 (3) Whenever the Regional Administrator determines that the proposed revision is
27 substantial, he shall publish and circulate notice to those persons known to be interested in such
28 matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS.
29 The Regional Administrator shall approve or disapprove program revisions based on whether the
30 program fulfills the requirements of the Act and this part, and shall publish notice of his decision
31 in the Federal Register. For purposes of this paragraph, substantial revisions include, but are not
32 limited to, revisions that affect the area of jurisdiction, scope of activities regulated, criteria for
33 review of permits, public participation, or enforcement capability.
34

35 (4) Substantial program changes shall become effective upon approval by the Regional
36 Administrator and publication of notice in the Federal Register.
37

38 (e) Whenever the Regional Administrator has reason to believe that circumstances have
39 changed with respect to a State's program, he may request and the State shall provide a
40 supplemental Attorney General's statement, program description, or such other documents or
41 information as are necessary to evaluate the program's compliance with the requirements of the
42 Act and this part.
43
44
45

46 **SUBPART B(2) - STATE PROGRAM ADMINISTRATIVE PROCEDURES**

47

48 **SUBSEQUENT TO THE APPROVAL OF A STATE PROGRAM BY THE REGIONAL** 49 **ADMINISTRATOR UNDER SUBPART B.1, THE REGIONAL ADMINISTRATOR, THE**

1 SECRETARY, AND THE DIRECTOR SHALL DEVELOP PROCEDURES NECESSARY
2 TO ADMINISTER THE APPROVED STATE PROGRAM. THE PROCEDURES SHALL
3 BE INCORPORATED INTO A MEMORANDUM OF AGREEMENT EXECUTED BY
4 THE DIRECTOR AND THE REGIONAL ADMINISTRATOR, AND A MEMORANDUM
5 OF AGREEMENT EXECUTED BY THE DIRECTOR AND THE SECRETARY. WHEN
6 MORE THAN ONE AGENCY WITHIN A STATE HAS RESPONSIBILITY FOR
7 ADMINISTERING THE STATE PROGRAM, DIRECTORS OF EACH OF THE
8 RESPONSIBLE STATE AGENCIES SHALL BE PARTIES TO EACH MEMORANDUM
9 OF AGREEMENT.

10
11 **§ 233.10 - Memorandum of Agreement with Regional Administrator.**

12
13 (a) Any State that seeks to administer a program under this part shall submit a Memorandum
14 of Agreement executed by the Director and the Regional Administrator. **WITHIN 60 DAYS OF**
15 **APPROVAL OF A STATE PROGRAM BY THE REGIONAL ADMINISTRATOR, THE**
16 **DIRECTOR AND THE REGIONAL ADMINISTRATOR SHALL EXECUTE A**
17 **MEMORANDUM OF AGREEMENT THAT SETS OUT THE STATE AND FEDERAL**
18 **ADMINISTRATIVE AND ENFORCEMENT RESPONSIBILITIES UNDER THE STATE-**
19 **ASSUMED PROGRAM. ~~The Memorandum of Agreement shall become effective upon~~**
20 **~~approval of the State program.~~** When more than one agency within a State has responsibility for
21 administering the State program, Directors of each of the responsible State agencies shall be parties
22 to the Memorandum of Agreement.

23
24 (b) The Memorandum of Agreement **~~shall set out the State and Federal responsibilities~~**
25 **~~for program administration and enforcement. These~~** shall include, but not be limited to:

26
27 (1) Provisions specifying classes and categories of permit applications for which EPA
28 will waive Federal review (as specified in section 233.51).

29
30 (2) Provisions specifying the frequency and content of reports, documents and other
31 information which the State may be required to submit to EPA in addition to the **~~annual~~**
32 **BIENNIAL** report, as well as a provision establishing the submission date for the **~~annual~~**
33 **BIENNIAL** report. The State shall also allow EPA routinely to review State records, reports and
34 files relevant to the administration and enforcement of the approved program.

35
36 (3) Provisions addressing EPA and State roles and coordination with respect to
37 compliance monitoring and enforcement activities.

38
39 (4) Provisions addressing modification of the Memorandum of Agreement.

40
41 **§ 233.11 - Memorandum of Agreement with the Secretary.**

42
43 (a) **~~Before a State program is approved under this part, the Director shall enter into a~~**
44 **~~Memorandum of Agreement with the Secretary.~~** **WITHIN 60 DAYS OF APPROVAL OF A**
45 **STATE PROGRAM BY THE REGIONAL ADMINISTRATOR, THE DIRECTOR AND**
46 **THE SECRETARY SHALL EXECUTE A MEMORANDUM OF AGREEMENT THAT**
47 **SETS OUT THE STATE AND FEDERAL ADMINISTRATIVE RESPONSIBILITIES**
48 **UNDER THE STATE-ASSUMED PROGRAM.** When more than one agency within a State
49 has responsibility for administering the State program, Directors of each of the responsible
50 agencies shall be parties of the Memorandum of Agreement.

(b) The Memorandum of Agreement shall include:

(1) ~~A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.~~ A LIST, MAINTAINED BY THE SECRETARY OF NAVIGABLE WATERS REGULATED UNDER SECTION 10 OF THE RIVERS AND HARBORS ACT, THAT IDENTIFIES THE WATERS OVER WHICH THE SECRETARY RETAINS JURISDICTION, EXCEPT FOR THOSE WATERS THAT:

- (I) ARE ON THE SECTION 10 LIST BASED SOLELY ON HISTORIC USE; OR
- (II) ARE ASSUMABLE BY A TRIBE.

(2) AN ADMINISTRATIVE BOUNDARY LINE THAT ESTABLISHES THE LANDWARD EXTENT OF THE SECRETARY'S JURISDICTION OVER WETLANDS ADJACENT TO RETAINED NAVIGABLE SECTION 10 WATERS. THE SECRETARY AND THE DIRECTOR SHALL ESTABLISH AN ADMINISTRATIVE BOUNDARY TAKING INTO ACCOUNT EXISTING STATE REGULATIONS, MAPPING PROTOCOLS AND CONVENTIONS, OR NATURAL FEATURES THAT MAY INCREASE REGULATORY PRACTICABILITY OR PUBLIC UNDERSTANDING. IF THE SECRETARY AND THE DIRECTOR ARE UNABLE TO ESTABLISH AN ADMINISTRATIVE BOUNDARY WITHIN THE 60-DAY TIME PERIOD, THEN THE ADMINISTRATIVE BOUNDARY SHALL EXTEND 300-FEET FROM THE BANKS OF RETAINED WATERS.

(2)(3) Procedures whereby the Secretary will, ~~upon program approval~~, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

~~Note: Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue section 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.~~

(3)(4) An identification of all NATIONWIDE general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce ~~upon receiving approval of~~ UNDER its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions.

(5) WHERE A STATE PERMIT PROGRAM INCLUDES COVERAGE OF THOSE TRADITIONALLY NAVIGABLE WATERS IN WHICH ONLY THE SECRETARY MAY ISSUE SECTION 404 PERMITS, THE SECRETARY AND DIRECTOR SHALL ESTABLISH PROCEDURES FOR JOINT PROCESSING OF FEDERAL AND STATE PERMITS, INCLUDING JOINT PUBLIC NOTICES AND PUBLIC HEARINGS. WHERE THE SECRETARY HAS IMPLEMENTED SUCCESSFUL STATE PROGRAMMATIC OR REGIONAL GENERAL PERMITS TO ADDRESS LOW RISK ACTIVITIES FOR A PERIOD OF AT LEAST 5 YEARS, THE SECRETARY SHALL CONTINUE THIS PRACTICE, UNLESS THE SECRETARY FINDS, AFTER AN OPPORTUNITY FOR PUBLIC COMMENT AND HEARING, THAT

1 THE PROGRAMMATIC OR REGIONAL GENERAL PERMIT SHOULD BE
2 DISCONTINUED OR REVOKED ON THE BASIS THAT THE PREVIOUSLY
3 COVERED ACTIVITIES NO LONGER POSE A LOW RISK.

4
5
6
7 SUBPART B(3) - PROGRAM TRANSFER

8
9 UPON APPROVAL OF A STATE PROGRAM BY THE REGIONAL ADMINISTRATOR
10 UNDER SUBPART B(1), AND THE EXECUTION OF THE MEMORANDUM OF
11 AGREEMENT BETWEEN THE REGIONAL ADMINISTRATOR AND THE
12 DIRECTOR, AND THE EXECUTION OF THE MEMORANDUM OF AGREEMENT
13 BETWEEN THE SECRETARY AND THE DIRECTOR UNDER SUBPART B(2), THE
14 REGIONAL ADMINISTRATOR SHALL PUBLISH NOTICE IN THE FEDERAL
15 REGISTER. TRANSFER OF THE PROGRAM TO THE STATE SHALL NOT BE
16 CONSIDERED EFFECTIVE UNTIL SUCH NOTICE APPEARS IN THE FEDERAL
17 REGISTER. THE SECRETARY SHALL SUSPEND THE ISSUANCE BY THE CORPS
18 OF SECTION 404 PERMITS IN STATE REGULATED WATERS ON SUCH EFFECTIVE
19 DATE.
20

21
22
23 SUBPART C – PERMIT REQUIREMENTS

24
25 § 233.20 – Prohibitions. No comments or recommendations at this time.

26
27 § 233.21 – General Permits. No comments or recommendations at this time.

28
29 § 233.22 – Emergency permits.

30
31 (a) Notwithstanding any other provision of this part, the Director may issue a temporary
32 emergency permit for a discharge of dredged or fill material if unacceptable harm to life or ~~severe~~
33 **SIGNIFICANT** loss of physical property is likely to occur before a permit could be issued or
34 modified under procedures normally required.
35

36 (b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the
37 emergency situation, all applicable requirements of section 233.23.
38

39 (1) Any emergency permit shall be limited to the duration of time (typically no more
40 than 90 days) required to complete the authorized emergency action.
41

42 (2) The emergency permit shall have a condition requiring appropriate restoration of
43 the site.
44

45 (c) The emergency permit may be terminated at any time without process (section 233.36)
46 if the Director determines that termination is necessary to protect human health or the environment.
47

48 (d) The Director shall consult in an expeditious manner, such as by telephone, with the
49 Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit.

1
2 (e) The emergency permit may be oral or written. If oral, it must be followed within 5 days
3 by a written emergency permit. A copy of the written permit shall be sent to the Regional
4 Administrator.

5
6 (f) Notice of the emergency permit shall be published and public comments solicited in
7 accordance with section 233.32 as soon as possible but no later than 10 days after the issuance
8 date.
9

10 **§ 233.23 – Permit conditions.**

11
12 (a) For each permit the Director shall establish conditions which assure compliance with all
13 applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable
14 section 303 water quality standards, and applicable section 307 effluent standards and prohibitions.
15

16 (b) Section 404 permits ~~be effective for a fixed term not to exceed 5 years.~~

17
18 **(1) SHALL BE EFFECTIVE FOR A FIXED TERM NOT TO EXCEED 5**
19 **YEARS.**

20
21 **(2) MAY BE REISSUED FOR ADDITIONAL 5-YEAR PERIODS WITHOUT**
22 **PUBLIC NOTICE AND OPPORTUNITY FOR HEARING IF THE PERMITTEE:**

23
24 **(I) APPLIES FOR PERMIT REISSUANCE AT LEAST 90 DAY PRIOR**
25 **TO THE EXPIRATION DATE OF THE PERMIT;**

26
27 **(II) SUBMITS AN UPDATED DELINEATION DEMONSTRATING THAT**
28 **THE WATERS OF THE UNITED STATES LOCATED ON THE PROPERTY BEING**
29 **DEVELOPED HAVE NOT SIGNIFICANTLY CHANGED;**

30
31 **(III) DEMONSTRATES CONTINUED COMPLIANCE WITH ALL**
32 **APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS, INCLUDING**
33 **THE 404(B)(1) GUIDELINES, APPLICABLE SECTION 303 WATER QUALITY**
34 **STANDARDS, AND APPLICABLE SECTION 307 EFFLUENT STANDARDS AND**
35 **PROHIBITIONS.**

36
37 (c) Each 404 permit shall include conditions meeting or implementing the following
38 requirements:
39

40 (1) A specific identification and complete description of the authorized activity
41 including name and address of permittee, location and purpose of discharge, type and quantity of
42 material to be discharged. (This subsection is not applicable to general permits).
43

44 (2) Only the activities specifically described in the permit are authorized.
45

46 (3) The permittee shall comply with all conditions of the permit even if that requires
47 halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes
48 a violation of the Act as well as of State statute and/or regulation.
49

Commented [MDE7]: This language is consistent with Section 233.36 (Modification, suspension or revocation of permits), which states in paragraph (c)(1): When permit modification is proposed, only conditions subject to modification need to be reopened.

1 (4) The permittee shall take all reasonable steps to minimize or prevent any discharge
2 in violation of this permit.

3
4 (5) The permittee shall inform the Director of any expected or known actual
5 noncompliance.

6
7 (6) The permittee shall provide such information to the Director, as the Director
8 requests, to determine compliance status, or whether cause exists for permit modification,
9 revocation or termination.

10
11 (7) Monitoring, reporting and recordkeeping requirements as needed to safeguard the
12 aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a
13 minimum shall include monitoring and reporting of any expected leachates, reporting of
14 noncompliance, planned changes or transfer of the permit.)

15
16 (8) Inspection and entry. The permittee shall allow the Director, or his authorized
17 representative, upon presentation of proper identification, at reasonable times to:

18
19 (i) Enter upon the permittee's premises where a regulated activity is located or
20 where records must be kept under the conditions of the permit.

21
22 (ii) Have access to and copy any records that must be kept under the conditions
23 of the permit,

24
25 (iii) Inspect operations regulated or required under the permit, and

26
27 (iv) Sample or monitor, for the purposes of assuring permit compliance or as
28 otherwise authorized by the Act, any substances or parameters at any location.

29
30 (9) Conditions assuring that the discharge will be conducted in a manner which
31 minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of
32 the United States, such as requirements for restoration or mitigation.

33
34
35
36 **SUBPART D – PROGRAM OPERATION**

37
38 **§ 233.30 – Application for a permit.** No comments or recommendations at this time.

39
40 **§ 233.31 – Coordination requirements.** No comments or recommendations at this time.

41
42 **§ 233.32 – Public notice.**

43
44 (a) Applicability.

45
46 (1) The Director shall give public notice of the following actions:

47
48 (i) Receipt of a permit application.

49
50 (ii) Preparation of a draft general permit.

1
2 (iii) Consideration of a major modification to an issued permit.

3
4 (iv) Scheduling of a public hearing.

5
6 (v) Issuance of an emergency permit.

7
8 (2) Public notices may describe more than one permit or action.

9
10 (b) Timing.

11
12 (1) The public notice shall provide a reasonable period of time, normally at least 30
13 days, within which interested parties may express their views concerning the permit application.

14
15 (2) Public notice of a public hearing shall be given at least 30 days before the hearing.

16
17 (3) The Regional Administrator may approve a program with shorter public notice
18 timing if the Regional Administrator determines that sufficient public notice is provided for.

19
20 (c) The Director shall give public notice by each of the following methods:

21
22 (1) By ~~mailing~~ **DISTRIBUTING** a copy of the notice **BY MAIL OR**
23 **ELECTRONIC MAIL** to the following persons (any person otherwise entitled to receive notice
24 under this paragraph may waive his rights to receive notice for any classes or categories of
25 permits):

26
27 (i) The applicant.

28
29 (ii) Any agency with jurisdiction over the activity or the disposal site, whether or
30 not the agency issues a permit.

31
32 (iii) Owners of property adjoining the property where the regulated activity will
33 occur.

34
35 (iv) All persons who have specifically requested copies of public notices. (The
36 Director may update the mailing list from time to time by requesting written indication of
37 continued interest from those listed. The Director may delete from the list the name of any person
38 who fails to respond to such a request.)

39
40 (v) Any State whose waters may be affected by the proposed discharge.

41
42 (2) ~~In addition, by~~ **BY** providing notice in at least one other way ~~(such as~~
43 ~~advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the~~
44 ~~area affected by the activity, SUCH AS:~~

45
46 (I) ADVERTISEMENT IN A NEWSPAPER OF SUFFICIENT
47 CIRCULATION TO COVER THE AREA AFFECTED BY THE ACTIVITY; OR

48
49 (II) **MAKING MATERIALS AVAILABLE ON A PUBLIC WEB SITE**
50 **IDENTIFIED BY THE DIRECTOR.**

1
2 (d) All public notices shall contain at least the following information:
3

4 (1) The name and address of the applicant and, if different, the address or location of
5 the activity(ies) regulated by the permit.
6

7 (2) The name, address, ~~and~~ telephone number, **AND ELECTRONIC MAIL**
8 **ADDRESS** of a person to contact for further information.
9

10 (3) A brief description of the comment procedures and procedures to request a public
11 hearing, including deadlines.
12

13 (4) A brief description of the proposed activity, its purpose and intended use, so as to
14 provide sufficient information concerning the nature of the activity to generate meaningful
15 comments, including a description of the type of structures, if any, to be erected on fills, and a
16 description of the type, composition and quantity of materials to be discharged.
17

18 (5) A plan and elevation drawing showing the general and specific site location and
19 character of all proposed activities, including the size relationship of the proposed structures to the
20 size of the impacted waterway and depth of water in the area.
21

22 (6) A paragraph describing the various evaluation factors, including the 404(b)(1)
23 Guidelines or State-equivalent criteria, on which decisions are based.
24

25 (7) Any other information which would significantly assist interested parties in
26 evaluating the likely impact of the proposed activity.
27

28 (e) Notice of public hearing shall also contain the following information:
29

30 (1) Time, date, and place of hearing.
31

32 (2) Reference to the date of any previous public notices relating to the permit.
33

34 (3) Brief description of the nature and purpose of the hearing.
35

36 **§ 233.33 – Public hearing.**
37

38 (a) Any interested person may request a public hearing during the public comment period as
39 specified in section 233.32. Requests shall be in writing, and shall state the nature of the issues
40 proposed to be raised at the hearing, **AND SHALL BE FORWARDED TO THE DIRECTOR BY**
41 **MAIL OR ELECTRONIC MAIL.**
42

43 (b) The Director shall hold a public hearing whenever he determines there is a significant
44 degree of public interest in a permit application or a draft general permit. He may also hold a
45 hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the
46 permit application.
47

48 (c) At a hearing, any person may submit oral or written statements or data concerning the
49 permit application or draft general permit. The public comment period shall automatically be

1 extended to the close of any public hearing under this section. The presiding officer may also
2 extend the comment period at the hearing.

3
4 (d) All public hearings shall be reported verbatim. Copies of the record of proceedings may
5 be purchased by any person from the Director or the reporter of such hearing. A copy of the
6 transcript (or if none is prepared, a tapeRECORDING of the proceedings) shall be made available
7 for public inspection at an appropriate State office.

Commented [MDE8]: I was unable to find anything in Section 404 of the CWA requiring that a public hearing be reported verbatim. However, since the regulation allows a tape of the proceeding to suffice as documentation, trying to remove or limit this requirement seems unnecessary.

8
9 **§ 233.34 – Making a decision on the permit application.**

10
11 (a) The Director will review all applications for compliance with the 404(b)(1) Guidelines
12 and/or equivalent State environmental criteria as well as any other applicable State laws or
13 regulations.

14
15 (b) The Director shall consider all comments received in response to the public notice, and
16 public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall
17 be made part of the official record on the application.

18
19 (c) After the Director has completed his review of the application and consideration of
20 comments, the Director will determine, in accordance with the record and all applicable
21 regulations, whether or not the permit should be issued. No permit shall be issued by the Director
22 under the circumstances described in section 233.20. The Director shall prepare a written
23 determination on each application outlining his decision and rationale for his decision. The
24 determination shall be dated, signed and included in the official record prior to final action on the
25 application. The official record shall be open to the public.

Commented [MDE9]: I was unable to find anything in Section 404 of the CWA requiring documentation of the Director's decision. However, since the language is general, it may be easier to just develop a form that would satisfy this requirement than to remove or limit its application.

26
27 **§ 233.35 – Issuance and effective date of permit.** No comments or recommendations at this
28 time.

29
30 **§ 233.36 – Modification, suspension or revocation of permits.** No comments or
31 recommendations at this time.

32
33 **§ 233.37 – Signatures on permit applications and reports.** No comments or recommendations
34 at this time.

35
36 **§ 233.38 – Continuation of expiring permits.** No comments or recommendations at this time.

37
38
39
40 **SUBPART E – COMPLIANCE EVALUATION AND ENFORCEMENT** No comments or
41 recommendations at this time.

42
43
44 **SUBPART F – FEDERAL OVERSIGHT.**

45
46
47 **§ 233.50 - Review of and objection to State permits.**

48
49 (a) The Director shall promptly transmit to the Regional Administrator:
50

1 (1) A copy of the public notice for any complete permit applications received by the
2 Director, except those for which permit review has been waived under section 233.51. The State
3 shall supply the Regional Administrator with copies of public notices for permit applications for
4 which permit review has been waived whenever requested by EPA.

5
6 (2) A copy of a draft general permit whenever the State intends to issue a general
7 permit.

8
9 (3) Notice of every significant action taken by the State agency related to the
10 consideration of any permit application except those for which Federal review has been waived or
11 draft general permit.

12
13 (4) A copy of every issued permit.

14
15 (5) A copy of the Director's response to another State's comments/-recommendations,
16 if the Director does -not accept these recommendations (section 233.32(a)).

17
18 **(B) THE DIRECTOR SHALL MAKE THE MATERIALS DESCRIBED IN**
19 **SUBSECTION (A) OF THIS SECTION AVAILABLE TO THE ADMINISTRATOR**
20 **USING ONE OF THE FOLLOWING METHODS:**

21
22 (1) **U.S MAIL:**

23
24 (2) **ELECTRONIC MAIL;**

25
26 (3) **ELECTRONIC NOTICE (E-NOTICE); OR**

27
28 (4) **PUBLIC WEB SITE (E-ACCESS) IDENTIFIED BY THE DIRECTOR.**

29
30 **(b)(C)** Unless review has been waived under section 233.51, the Regional Administrator
31 shall provide a copy of each public notice, each draft general permit, and other information needed
32 for review of the application to the Corps, FWS, and NMFS, within 10 days of receipt. These
33 agencies shall notify the Regional Administrator within 15 days of their receipt if they wish to
34 comment on the public notice or draft general permit. Such agencies should submit their evaluation
35 and comments to the Regional Administrator within 50 days of such receipt. The final decision to
36 comment, object or to require permit conditions shall be made by the Regional Administrator.
37 (These times may be shortened by mutual agreement of the affected Federal agencies and the
38 State.)

39
40 **(e)(D)** If the information provided is inadequate to determine whether the permit
41 application or draft general permit meets the requirements of the Act, these regulations, and the
42 404(b)(1) Guidelines, the Regional Administrator may, within 30 days of receipt, request the
43 Director to transmit to the Regional Administrator the complete record of the permit proceedings
44 before the State, or any portions of the record, or other information, including a supplemental
45 application, that the Regional Administrator determines necessary for review.

46
47 **(d)(E)** If the Regional Administrator intends to comment upon, object to, or make
48 recommendations with respect to a permit application, draft general permit, or the Director's failure
49 to accept the recommendations of an affected State submitted pursuant to section 233.31(a), he
50 shall notify the Director of his intent within 30 days of receipt. If the Director has been so notified,

1 the permit shall not be issued until after the receipt of such comments or 90 days of the Regional
2 Administrator's receipt of the public notice, draft general permit or Director's response (section
3 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30
4 days of receipt that there is no comment but that he reserves the right to object within 90 days of
5 receipt, based on any new information brought out by the public during the comment period or at
6 a hearing.

7
8 **(e)(F)** If the Regional Administrator has given notice to the Director under paragraph (d)
9 of this section, he shall submit to the Director, within 90 days of receipt of the public notice, draft
10 general permit, or Director's response (section 233.31(a)), a written statement of his comments,
11 objections, or recommendations; the reasons for the comments, objections, or recommendations;
12 and the actions that must be taken by the Director in order to eliminate any objections. Any such
13 objection shall be based on the Regional Administrator's determination that the proposed permit is
14 (1) the subject of an interstate dispute under section 233.31(a) and/or (2) outside requirements of
15 the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make
16 available upon request a copy of any comment, objection, or recommendation on a permit
17 application or draft general permit to the permit applicant or to the public.

18
19 **(f)(G)** When the Director has received an EPA objection or requirement for a permit
20 condition to a permit application or draft general permit under this section, he shall not issue the
21 permit unless he has taken the steps required by the Regional Administrator to eliminate the
22 objection.

23
24 **(g)(H)** Within 90 days of receipt by the Director of an objection or requirement for a permit
25 condition by the Regional Administrator, the State or any interested person may request that the
26 Regional Administrator hold a public hearing on the objection or requirement. The Regional
27 Administrator shall conduct a public hearing whenever requested by the State proposing to issue
28 the permit, or if warranted by significant public interest based on requests received.

29
30 **(h)(I)** If a public hearing is held under paragraph (g) of this section, the Regional
31 Administrator shall, following that hearing, reaffirm, modify or withdraw the objection or
32 requirement for a permit condition, and notify the Director of this decision.

33
34 (1) If the Regional Administrator withdraws his objection or requirement for a permit
35 condition, the Director may issue the permit.

36
37 (2) If the Regional Administrator does not withdraw the objection or requirement for a
38 permit condition, the Director must issue a permit revised to satisfy the Regional Administrator's
39 objection or requirement for a permit condition or notify EPA of its intent to deny the permit within
40 30 days of receipt of the Regional Administrator's notification.

41
42 **(i)(J)** If no public hearing is held under paragraph (g) of this section, the Director within
43 90 days of receipt of the objection or requirement for a permit condition shall either issue the
44 permit revised to satisfy EPA's objections or notify EPA of its intent to deny the permit.

45
46 **(j)(K)** In the event that the Director neither satisfies EPA's objections or requirement for
47 a permit condition nor denies the permit, the Secretary shall process the permit application.

48
49 **§ 233.51 - Waiver of review.** No comments or recommendations at this time.
50

1 § 233.52 – Program reporting.

2
3 (a) The starting date for the **annualBIENNIAL** period to be covered by reports shall be
4 established in the Memorandum of Agreement with the Regional Administrator (section 233.13.)
5

6 (b) The Director shall submit to the Regional Administrator within 90 days after completion
7 of the **annualBIENNIAL** period, a draft **annualBIENNIAL** report evaluating the State's
8 administration of its program identifying problems the State has encountered in the administration
9 of its program and recommendations for resolving these problems. Items that shall be addressed
10 in the **annualBIENNIAL** report include an assessment of the cumulative impacts of the State's
11 permit program on the integrity of the State regulated waters; identification of areas of particular
12 concern and/or interest within the State; the number and nature of individual and general permits
13 issued, modified, and denied; number of violations identified and number and nature of
14 enforcement actions taken; number of suspected unauthorized activities reported and nature of
15 action taken; an estimate of extent of activities regulated by general permits; and the number of
16 permit applications received but not yet processed.
17

18 (c) The State shall make the draft **annualBIENNIAL** report available for public inspection.
19

20 (d) Within 60 days of receipt of the draft **annualBIENNIAL** report, the Regional
21 Administrator will complete review of the draft report and transmit comments, questions, and/or
22 requests for additional evaluation and/or information to the Director.
23

24 (e) Within 30 days of receipt of the Regional Administrator's comments, the Director will
25 finalize the **annualBIENNIAL** report, incorporating and/or responding to the Regional
26 Administrator's comments, and transmit the final report to the Regional Administrator.
27

28 (f) Upon acceptance of the **annualBIENNIAL** report, the Regional Administrator shall
29 publish notice of availability of the final **annualBIENNIAL** report.
30

31 § 233.53 – Withdrawal of program approval. No comments or recommendations at this time.
32
33
34

35 **SUBPART G – ELIGIBLE INDIAN TRIBES** No comments or recommendations at this time.
36
37
38

39 **SUBPART H – APPROVED STATE PROGRAMS** No comments or recommendations at this
40 time.